

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Re: Levaquin Products
Liability Litigation,

File No. 08-md-1943
(JRT/AJB)

Minneapolis, Minnesota
August 28, 2012
1:16 P.M.

BEFORE THE **HONORABLE JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

APPEARANCES

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Via Telephone:

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For the Defendants:

JOHN WINTER, ESQ.
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Via Telephone:

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1:16 P.M.

2

3

(In open court.)

4

THE COURT: You may be seated. Good afternoon,
5 everyone.

6

This is multi-district litigation number 08-1943,
7 In Re: Levaquin Products Liability Litigation.

8

Let's have counsel present in the courtroom note
9 their appearances. First for the plaintiffs?

10

MR. GOLDSER: Good afternoon, Your Honor. Ron
11 Goldser for plaintiffs, and I have some introductions to
12 make. First Jonathan Mencil from the Charles Johnson Law
13 Firm in Minneapolis represents the plaintiff Violet
14 Magnuson, one of the six.

15

Rick Paul of Kansas City is going to be joining
16 our trial team, and Bill Bross who you may remember
17 initially from the PSC represents Robert Tomalka, also one
18 of the six. Caia Johnson from the Lockridge firm, and I
19 would be remiss in not introducing her.

20

MR. ZIMMERMAN: Good afternoon, Your Honor.
21 Bucky Zimmerman for the plaintiffs.

22

THE COURT: Good afternoon.

23

MS. GENEVIEVE ZIMMERMAN: Good afternoon.
24 Genevieve Zimmerman for the plaintiffs.

25

THE COURT: All right. Now for the defendants?

1 MS. VAN STEENBURGH: Hello, Your Honor. Tracy
2 Van Steenburgh for the defendants.

3 MR. WINTER: Good afternoon, Your Honor. John
4 Winter for the defendants.

5 THE COURT: Good afternoon to both of you.
6 For the plaintiffs on the telephone, please?

7 **(Inaudible.)**

8 THE COURT: Let's say that again. We got two --

9 MR. FITZGERALD: Good afternoon. Kevin
10 Fitzgerald for plaintiffs.

11 MR. RASMUSSEN: Good afternoon, Your Honor.
12 Kristian Rasmussen, counsel for plaintiffs.

13 MS. FULMER: Good afternoon, Your Honor. This is
14 Brenda Fulmer on behalf of plaintiffs.

15 MR. TERRY: Good afternoon, Your Honor. This is
16 Eric Terry on behalf of plaintiffs.

17 MR. MILLER: This is Daniel Miller on behalf of
18 plaintiffs.

19 THE COURT: Anyone else for plaintiffs?
20 Okay. For the defense on the phone?

21 MR. IRWIN: Jim Irwin, Your Honor.

22 THE COURT: Good afternoon, Mr. Irwin. Anyone
23 else? All right. Thank you.

24 Let's proceed here. We have a proposed joint
25 status conference agenda. Mr. Goldser, do you want to

1 begin?

2 MR. GOLDSER: Thank you, Your Honor. Many of the
3 things we have to talk about are concerning the trial,
4 upcoming trial and trial date. The trial date is first on
5 the list, and I thought we might take that up first. You
6 may or may not want to hear about other things before you
7 decide what to do with the trial date, but I'll let
8 Ms. Van Steenburgh go first since she was the one who wrote
9 the first letter, and then we will chime in.

10 THE COURT: Okay.

11 MS. VAN STEENBURGH: Thank you. Good afternoon,
12 Your Honor. I'm not going to reiterate or repeat what is
13 in my August 16 letter. There are a few things and a few
14 comments that I could use or have now to supplement. In
15 the letter, we had asked the Court to strike the date for
16 the current trial of October 29 and move it to a different
17 date because it's becoming quite clear that we're not going
18 to be able to get everything done before that date in order
19 to pick a case.

20 And since I wrote the letter to the Court,
21 nothing has gotten really much better. We have had -- we
22 have noticed many depositions. In fact, most of the
23 healthcare provider depositions that we noticed were
24 noticed on the 6th and the 8th of August, and we have no
25 dates for any of those yet.

1 So we have taken one prescribing physician
2 deposition. We have two others scheduled. We have two --
3 we have four plaintiffs scheduled, but we have a whole
4 plethora of depositions that need to be taken, and then
5 today Mr. Goldser said he wants to take a physical
6 therapist in one of the cases, and we heard from her
7 attorney that that may not happen until October.

8 So we are finding that getting the doctors
9 scheduled, having these things move forward in an
10 expeditious manner is just not happening as quickly as we
11 want.

12 Added to that the fact that we keep trying to
13 pick a couple of cases to select from the list, and the
14 plaintiffs keep dismissing them is compounding the problem.
15 We have picked eight cases so far, and eight cases have
16 been dismissed.

17 We tried very hard to select cases that would
18 have some variety. We picked four post black box cases.
19 Five of them involved tendinitis. One involved a rotator
20 cuff, and we had one other tendon injury. All of those
21 cases have been voluntarily dismissed by plaintiffs'
22 counsel.

23 We have two that are in the offing right now, the
24 Suzanne Grindle case. Mr. Bertram, who represents her,
25 last corresponded with me on the 23rd, saying we will get

1 back to you as to whether we're going forward, and I have
2 not heard from him since.

3 The Rutten case, which involves the Lockridge
4 firm, I talked to Ms. Flaherty this morning via e-mail.
5 She thought they were going forward, but she was going to
6 double check and let me know. So we still have a couple of
7 cases out there that we don't even know if we're going to
8 start discovery on those. So, again, that compounds the
9 problem.

10 One thing I might note, Your Honor, is that with
11 all the dismissals we only have nine cases that are left,
12 Minnesota resident/Minnesota filed cases that are in Phase
13 III. We have 13 total Minnesota filed/Minnesota resident
14 cases that I'm aware of as of this date.

15 The other four are Olson, Karkoska, Kirkes and
16 Johnson, and those were from the first phase. I believe
17 that Karkoska and Kirkes had been up previously and have
18 not been included as trial selections, but Olson and
19 Johnson are still out there.

20 We only have between 9 and 13 cases. If the
21 Court, one thing to kind of posit now, if the Court decides
22 that this is a date that is not going to go forward on the
23 29th, it is possible that we could try to do discovery in
24 all of the remaining cases and then have a bigger pool to
25 select from and then have cases set up in the future so

1 that we can try additional cases as they come up so we're
2 conducting all the discovery at the same time.

3 So just something to throw out there for the
4 Court's consideration.

5 THE COURT: How long would that take?

6 MS. VAN STEENBURGH: Depending on how many are
7 dismissed by the plaintiffs, it really wouldn't take that
8 long, but I would anticipate that we would want to look at
9 a trial probably sometime in March of next year is what
10 we're thinking of right now.

11 Between the holidays that would come up toward
12 the end of the year and beginning of the year and some
13 other trial commitments, I think that would probably be a
14 realistic date.

15 THE COURT: Mr. Goldser?

16 MR. GOLDSER: I am reluctant to give up a trial
17 date. I do agree that it's getting increasingly difficult
18 to get ready by the 29th. There are three cases, as you
19 know, that we believe should be the first cases tried, and
20 we think they should be tried together. That's Arnold,
21 Bechler and Tomalka, Tomalka being Mr. Bross's case.

22 We think those cases can be ready sooner rather
23 than later. I'm not certain that we can get them done in
24 time for an October 29th date. My concern is case specific
25 experts and getting them done and deposed, along with the

1 defense experts and deposed. That one, it seems to me, to
2 be one of the big hurdles that I'm facing.

3 I need to say that the notice of depositions for
4 some 15 doctors, treating doctors, that were purportedly
5 served on August 6th, I don't remember seeing them, and I
6 checked with my staff this morning. They didn't remember
7 seeing them.

8 We're just starting now to get some of those
9 scheduled, although there are a number on the list that we
10 were trying to make contact with ourselves because we
11 wanted to talk to them. So I'm not quite sure what
12 happened with that, but that also got somewhat delayed.

13 So what I can see happening is that we can
14 probably have Arnold, Bechler and Tomalka ready by January,
15 that we also ought to schedule another date three months
16 after that for another case or cases. We should be working
17 towards grouping them in multiple groups and multiple
18 groups that make sense.

19 I know that Olson, Karkoska, Kirkes and Johnson
20 belong to Mr. Saul's office. Perhaps Mr. Fitzgerald would
21 be interested in commenting on that. The other nine, I
22 don't have a problem with the notion of asking plaintiffs'
23 counsel whether they want to go forward with those cases.
24 I mean, it's time to decide, are those cases triable or not
25 triable.

1 As we proposed in our responsive letter, let's
2 set up trials on a quarterly basis. We can know as we walk
3 out of the courtroom today, if you would like, that Arnold,
4 Bechler and Tomalka will be up in January, that some of the
5 remaining cases that are on this list, like Mangin, Olive
6 and Magnuson and any among the Olson, Karkoska, Kirkes and
7 Johnson cases, if they're triable, can be up for an April
8 date, and whether they get consolidated remains to be seen.

9 Then if there are other cases beyond that that
10 haven't been tried by that time, let's have a July date so
11 that we have a series of trial dates and a series of cases
12 that we know are in the hopper and starting to get ready
13 and start getting them ready sooner rather than later.

14 Let me go back to the Arnold, Bechler and Tomalka
15 for a second because I'm suggesting they should be tried
16 together. Arnold and Bechler are '06 prescriptions.
17 Mr. Tomalka is an early '08 prescription. For our
18 purposes, there is no real difference in terms of the
19 warning that was available given the adequacy of
20 communication theory that we are propounding.

21 Mr. Tomalka is before the black box warning.
22 They're all three of them are respiratory. One is
23 steroids. The other are not. They all have local
24 prescribing doctors, so all the prescribing doctors can be
25 brought to court personally rather than by videotape.

1 We're interested in getting to try these cases
2 economically, so combining cases is important, and, you
3 know, the economics speak to multiple trials at the same
4 time. It may very well be possible thereafter to try, say,
5 a post black box warning case if that is viable, like
6 Mangin is a post black box warning case.

7 There may be others. There is an issue on that
8 that we will be addressing later today. So we think
9 October 29th is going to be tough. January is better.
10 Case specific experts are the problem, and we're working on
11 that.

12 Arnold, Bechler and Tomalka ought to go off in
13 January. We ought to have an April and July trial date,
14 and we ought to find out which cases plaintiffs' lawyers
15 want to try out of that group.

16 THE COURT: What about the idea of preparing all
17 for trial, all the remaining Minnesota resident cases?

18 MR. GOLDSER: I don't think that's a problem, but
19 I don't think we can get that all done by January. Arnold,
20 Bechler and Tomalka are clearly out in the lead in terms of
21 what has been scheduled, the work that has been done
22 already, the case specific expert reports that are
23 underway.

24 If you do it in two phases, do those three first
25 and then have all the rest of them ready for an April trial

1 so that we can pick and choose from all the rest of them,
2 that would work. I think that would be enough time for
3 everybody to get that done.

4 THE COURT: If we scheduled a March trial, would
5 all be done by then?

6 MR. GOLDSER: I don't think there is a
7 significant difference between March and April. I just
8 thought three months between, you know, might be a rounder
9 number, but two months would probably be fine. Depends on
10 when in January you have in mind. If we start in the
11 beginning of January and two months down the road in March,
12 that's different from the end of January and the beginning
13 of March.

14 THE COURT: Well, I have about -- how many weeks
15 do we have set aside for the criminal trial, eight?

16 THE CLERK: Six.

17 THE COURT: Six. Six, yeah. I have at least
18 scheduled right now a criminal trial, which is somewhat
19 complicated because it's a racketeering trial. That's set
20 for January 3rd. Of course, it may or may not go. It's
21 five or six defendants?

22 THE CLERK: Seven right now.

23 THE COURT: Seven, probably six.

24 THE CLERK: Right.

25 THE COURT: It's probably going to be January and

1 February. At least it's scheduled right now. It's a date
2 certain right now because of speedy trial issues.

3 MR. GOLDSER: Sure.

4 THE COURT: But, you know, it may go away. It's
5 not a guarantee, but after that, things are wide open.

6 MR. GOLDSER: And it will raise for at least our
7 side a question of some of the trial process that I would
8 like to get into a little later today. I preface that by
9 telling you I want to talk about what prior testimony can
10 be read in, as opposed to having witnesses live, and it's
11 an issue I would like to bring up at some point later
12 today.

13 The more we read in, the greater flexibility we
14 have, in other words. The more live witnesses, the harder
15 it is to schedule.

16 THE COURT: The more interesting it is for the
17 jurors.

18 MR. GOLDSER: I think we have a way of making it
19 interesting. After all, Ms. Zimmerman read Cheryl Blume
20 last time, and she was really right on the money.

21 THE COURT: All right. Ms. Van Steenburgh, what
22 do you have to say at this point?

23 MS. VAN STEENBURGH: Just a couple things, Your
24 Honor. I think you know the defendants' position, that the
25 cases should not be tried together, and let's just look at

1 the three that Mr. Goldser has mentioned, Arnold, Bechler
2 and Tomalka.

3 We think that Arnold will be a likely candidate
4 for summary judgment based on the information that we have
5 gathered so far. As between Arnold, Bechler and Tomalka,
6 there are differences. 2006, 2008, there is a significant
7 difference between the two.

8 In fact, there is a dear doctor letter that went
9 out in 2007 in the Tomalka case, so it would make the
10 evidence quite different. All of those cases involve
11 different facts, different issues. I mean, the Court
12 itself during the severance motion that we had indicated
13 that there were significant differences in each of the
14 plaintiff's cases, the facts, the medical conditions, all
15 of those kinds of things.

16 And it makes a trial very long, and it can be
17 very confusing for a jury. So we would maintain that a
18 single plaintiff would be preferable.

19 As to Mr. Goldser's suggestion that it should be
20 one of these three cases, I think I indicated in my letter
21 that we have some concern that the plaintiffs are
22 attempting to manipulate the discovery process because
23 rightfully they would like to have their case first, but
24 the Court hadn't issued an order saying that the plaintiffs
25 went first and which cases should go first.

1 We were trying to cooperate with the plaintiffs,
2 and the only cases in which they have gotten the
3 prescribers ready are the ones that they are now promoting.
4 We have been trying to cooperate. We certainly can make
5 some efforts to get the doctors scheduled. We have been
6 trying to let the plaintiffs do that.

7 It does sound a little bit like the plaintiffs
8 are trying to advance certain cases, and I thought we were
9 looking at a selection process. So we would prefer to go
10 that route if at all possible.

11 THE COURT: Anything else?

12 MS. VAN STEENBURGH: March would be doable for
13 all of those cases, I believe.

14 MR. GOLDSER: Well, you don't have an appropriate
15 brief and factual record to decide today whether the cases
16 should be consolidated. Certainly we would like to put
17 that in front of you.

18 I think what we can do is say that let's limit
19 ourselves, our focus, to a select number of cases for
20 purposes of a January ready day so that we can focus on
21 those and get the rest of them ready thereafter. You know,
22 sure, there are some doctors that were more available than
23 others.

24 It's not like we have completely ignored the rest
25 of them. On Magnuson, for example, Mr. Mencil can tell you

1 his efforts to track down the prescribing doctor in that
2 case, and they are working through a clinic who has got a
3 lawyer and their risk management department, and they are
4 being difficult, and it is not like that is going ignored.

5 The Mangin case is a post black box case, and we
6 have a discovery issue on that case in particular, but post
7 black box cases in general, which we will talk about a
8 little later today.

9 Mr. Olive's prescribing doctor, the sixth case,
10 is scheduled for September 11th and has been on the books
11 for a long time. So it's not like we're just doing the
12 three cases that we want. We're doing the six cases that
13 we identified that thus far plaintiffs are ready to try,
14 and the ones that plaintiffs aren't ready to try, they're
15 not ready to try, so they're being dismissed.

16 If you want to get the rest of them ready and
17 find out whether they're triable, I think that's a fine
18 idea, and we should do that. Let's get cases in the box
19 and ready to try them, and the three that I have mentioned
20 are closer than others, and whether or not they should be
21 consolidated should be the subject of a more formalized
22 motion on a more complete record.

23 THE COURT: Okay. Well, it seems to me that
24 we're not going to be able to be ready by the end of
25 October and finding a -- what's anticipated to be a three-

1 to four-week block depending on how many are tried at once
2 is, is difficult. I think at this point I have to prepare
3 for a January criminal trial. I have no reason to believe
4 it's not going to go then.

5 There is a large group of guilty pleas in the
6 case that have been done for quite some time. This other
7 group seems ready to, at least for now, to go to trial. So
8 if we're looking at March, first part of March, Tuesday,
9 the 5th might be an appropriate day for starting trial.
10 And if we're going out that far, it would be best in the
11 Court's view to have all the remaining Minnesota cases that
12 are triable ready to go.

13 And we would decide which case or cases to try
14 probably by the 1st of January, and then we will have
15 enough discovery, I believe, on each one to know the
16 situation. I would greatly prefer treating physicians who
17 can testify live in these cases. I don't know how many
18 that would involve, some of them certainly because they're
19 Minnesota plaintiffs.

20 And we should have, if there are going to be any
21 summary judgment motions in these cases, we should have
22 them heard and done well in advance. What would be a
23 reasonable time for summary judgment motions, if they are
24 to be brought?

25 MS. VAN STEENBURGH: I'm trying to think in terms

1 of, probably November, at the end of November.

2 THE COURT: The end of November?

3 MS. VAN STEENBURGH: Yeah. I think that would be
4 fine.

5 THE COURT: Well, let's go with that. Then we
6 can have them heard probably sometime in December, maybe
7 into early January, depending on how much time it takes to
8 respond and reply, but perhaps we can set a motions
9 deadline for summary judgment motions.

10 You know, there may well be other motions to come
11 later, but perhaps by the 26th of November, which is a
12 Monday. Does that work?

13 MS. VAN STEENBURGH: That's fine.

14 THE COURT: Okay. And then we'll set a hearing
15 date probably by early January then on any summary judgment
16 motions, but I think it's best to focus on all of them that
17 are left. That may result in some more being dismissed.
18 It may not, but then we can --

19 At some point in time I'm going to want in
20 writing each side's assessment of the triability of these
21 cases and how you would like to proceed, and then I will
22 decide how we're going to proceed.

23 Okay?

24 MR. GOLDSER: As I understand it, there are 13
25 that remain. Four of those are Olson, Karkoska, Kirkes and

1 Johnson. Of the remaining nine, I don't know if we're
2 clear what they are. I don't know if you have that list
3 that you can recite?

4 MS. VAN STEENBURGH: Yes.

5 MR. GOLDSER: That would be great.

6 MS. VAN STEENBURGH: I'm just going to give you
7 last I names. Dirschel, D-i-r-s-c-h-e-l. Norman.
8 Schuster, S-c-h-u-s-t-e-r. Melland, M-e-l-l-a-n-d.
9 Reichgeld, R-e-i-c-h-g-e-l-d. Blanch, B-l-a-n-c-h. Elias,
10 E-l-i-a-s. Stark, S-t-a-r-k. Schoonover,
11 S-c-h-o-o-n-o-v-e-r.

12 And of course, Grindle and Rutten are already on
13 the list.

14 MR. GOLDSER: How about Mroz?

15 MS. VAN STEENBURGH: Mroz is not on the list.

16 MR. GOLDSER: Shouldn't Mroz be on the list?

17 MS. VAN STEENBURGH: I don't believe so. Mroz is
18 a Wisconsin case as far as I know.

19 MR. GOLDSER: Okay. I will reach out to
20 plaintiffs' counsel on all those cases and let them know
21 they have to make decisions.

22 THE COURT: Okay. And what would be a reasonable
23 time for getting, if we're going to focus on deciding by
24 the first week in January exactly what we're going to try
25 so that any last minute work can be done well enough in

1 advance, will there be sufficient discovery done by the end
2 of November to be able to each side assess these cases?

3 MS. VAN STEENBURGH: I would think so, Your
4 Honor.

5 THE COURT: Does that make sense, Mr. Goldser?

6 MR. GOLDSER: Yes. I mean --

7 THE COURT: It is three months from now.

8 MR. GOLDSER: If a problem arises, we will let
9 the Court know in a particular case, but that seems quite a
10 reasonable starting point.

11 MS. VAN STEENBURGH: I neglected one, but
12 Mr. Goldser probably knows about it. It's his case,
13 Garvis, G-a-r-v-i-s.

14 THE COURT: All right. Sounds good.

15 MR. GOLDSER: So the next item on the list under
16 1C of course is discussing the current discovery status,
17 and I'm not sure that that's overwhelmingly important. I
18 mean, progress is being made. It's slower than we would
19 like.

20 THE COURT: Mm-hmm.

21 MR. GOLDSER: And then we just talked about trial
22 case selection as well, and I gather you will make that
23 decision down the road, which brings us to item number 3,
24 the Wells *Daubert* motion. That's also a defense item.

25 MS. VAN STEENBURGH: The only issue with respect

1 to that is that we were going to let the Court know that we
2 were going to bring a motion under *Daubert* on Dr. Wells'
3 testimony, which could impact a lot of things, and so we
4 were just talking about timing with respect to that.

5 We don't have to wait for a particular case to be
6 set for trial to do that, and I didn't know if the Court
7 wanted to set a date. We can probably have something
8 prepared in about 60 days.

9 THE COURT: 60 days, a motion?

10 MS. VAN STEENBURGH: Yes.

11 THE COURT: All right. So, so by early December,
12 then? Is that enough time for a response and argue this
13 one?

14 MR. GOLDSER: That seems like a little bit far
15 out for us, but we already have a summary judgment deadline
16 of November 26th. Why don't we just make it the same day?

17 MS. VAN STEENBURGH: We can do it in 45.

18 THE COURT: 45 days. Okay.

19 MR. GOLDSER: November 12th.

20 THE COURT: Maybe we should pick a different date
21 early November to argue that, then. Why don't you have the
22 motion in in 45 days. Just do the standard response, and
23 as soon as we have everything in, we will set the motion
24 date fairly quickly.

25 MS. VAN STEENBURGH: All right. Great.

1 THE COURT: A hearing date I mean. All right?

2 MR. GOLDSER: Next item on the list is punitive
3 damages motions, and this refers only to the six cases. We
4 have filed motions to amend the complaint for punitive
5 damages in all six cases. They are the simple one-page,
6 please do the same thing that you did in Schedin,
7 Christensen and Straka.

8 I don't know if you want to set any briefing
9 schedule for that. I don't know whether defense is going
10 to oppose them in any different fashion from before, but I
11 would like to get that teed up as well.

12 MS. VAN STEENBURGH: Your Honor, we would ask
13 that the Court defer anything with respect to those.
14 They're premature. We have done no, barely any discovery
15 in any of the cases, and there is plenty of case law
16 suggesting there has to be some kind of tie between
17 causation and punitive damages.

18 With respect to Mr. Olive, for example, we just
19 got his PFS last week. It is very possible that there
20 could be testimony developed during any one of these cases
21 where you could have a doctor who says, yes, I prescribed
22 it, yes, I was aware of this, now that I'm aware of this, I
23 would do it again.

24 I mean, we could have a motion for summary
25 judgment. There could be no causation. We would never

1 even get to an issue of punitive damages. This is very
2 premature. It's almost like adding it as part of the
3 complaint and then making a motion right after the
4 complaint has been served.

5 So we're happy to respond, but we think this is
6 premature, and this is something we would ask the Court to
7 defer for some time.

8 MR. GOLDSER: These were filed in anticipation of
9 an October 29th trial date.

10 THE COURT: Right.

11 MR. GOLDSER: I don't have any problem with a
12 response that comes down the road. I just want to make
13 sure it's on the record. We know that it's out there, and
14 we set up a schedule to address it.

15 THE COURT: Okay. Well, let's hold. Let's defer
16 for now. Certainly I would want to take these up after at
17 least some of the discovery has taken place. Perhaps we
18 can address this by late November.

19 MR. GOLDSER: Next item, again a defense item on
20 the agenda, deficient plaintiff fact sheets.

21 MS. VAN STEENBURGH: I'm looking for my letter
22 that I sent to Mr. Goldser. We have run into this issue of
23 deficient fact sheets on the plaintiffs' side from time to
24 time, Your Honor, and we brought it up a couple times in
25 2011 and previously in 2012.

1 Currently, we have sent out second deficiency
2 letters in 95 of the plaintiffs' cases.

3 THE COURT: 95, you say?

4 MS. VAN STEENBURGH: 95, yes. Initial deficiency
5 letters in 49 cases, and we just sent out initial
6 deficiency letters in an additional 89 cases. This is
7 falling further and further behind, and the proposal that
8 we have is that we have to bring this to a head, that at
9 some point we can develop a process that if the PFSSs are
10 not provided after a certain date, it's on pain of possible
11 dismissal because this is becoming cumbersome.

12 We cannot continue to monitor all of these and
13 try to get deficiency letters and try to get people to get
14 the PFSSs in. If they don't monitor and follow their own
15 cases, I'm not sure they're caring about their cases
16 enough, and we would request the Court to institute some
17 procedure by which the cases would be dismissed if they
18 don't get them in there.

19 THE COURT: By "deficient," do you mean not at
20 all?

21 MS. VAN STEENBURGH: Not at all.

22 THE COURT: It's not items missing. It's that
23 they haven't been filed?

24 MS. VAN STEENBURGH: Not at all. Right.

25 MR. GOLDSER: I think there is a procedure. It's

1 called the Rules of Civil Procedure, Rule 37. When, for
2 example, you don't answer interrogatories, the proponent of
3 those interrogatories can make a motion under Rule 37 to
4 compel the answers, and then if that order is then not
5 complied with, there is the potential for dismissal as a
6 sanction.

7 We have a procedure. So, you know, they're
8 asking for the entry of a blanket order. I don't know that
9 that's appropriate in any event. Each case needs to be
10 dealt with on its own particulars. There might be a reason
11 for why someone is deficient. For example, I know I have
12 had one client who has been out of the country for a number
13 of months.

14 It took him a while to get his plaintiff fact
15 sheet in. It's now in, once he returned from overseas. So
16 Rule 37 is the procedure, and we should follow it.

17 THE COURT: Why are there so many of them,
18 Mr. Goldser?

19 MR. GOLDSER: I don't know the answer, Your
20 Honor. I know that I have some in my office that we are
21 diligently following up on, and some people are just
22 nonresponsive, and I just can't answer for other plaintiffs
23 at this point in time.

24 Was there somebody on the phone who wanted to
25 chime in? No. Okay. I know, I know that we have some

1 that we are chasing people down. Some people just don't
2 want to respond, and ultimately, you know, they're going to
3 be faced with the pain of dismissal.

4 If they don't want their case to go forward, then
5 they don't want their case to go forward. I would like to
6 know that sooner rather than later myself.

7 MS. VAN STEENBURGH: Well, I have two comments to
8 that. We get no response on -- Mr. Goldser seems to have
9 an explanation, but we have never heard that explanation.
10 One, we sent out deficiency letters inviting some kind of
11 response, and we get nothing.

12 If what he is proposing is that we file motions
13 for all of these, we can file motions for all of these, and
14 then we're going to be into kind of a free-for-all in terms
15 of motion practice. We think it would be a much more
16 efficient way. We have done a lot to try to get these
17 people to respond, but we're happy to file 280 motions if
18 that's what it's going to take.

19 THE COURT: You had different categories. 95,
20 you had sent out two separate deficiency letters?

21 MS. VAN STEENBURGH: 95, we sent out 2. 49, we
22 had sent out initial deficiency letters, and just this past
23 week, we prepared an initial deficiency letter in 89
24 additional cases.

25 THE COURT: Is that a first letter or second

1 letter?

2 MS. VAN STEENBURGH: That's a first letter.

3 THE COURT: First letter?

4 MS. VAN STEENBURGH: Mm-hmm.

5 THE COURT: So we have 95 in the second letter
6 category. When did the first letter go out to them?

7 MS. VAN STEENBURGH: I don't know the answer to
8 that right off the top of my head.

9 THE COURT: Like this summer or earlier?

10 MS. VAN STEENBURGH: It would have been earlier
11 than that, I believe.

12 THE COURT: Well, we could -- surely we could go
13 through the motion practice. That's a lot of additional
14 work. It probably seems unnecessary for the context of an
15 MDL. The ones that are in the category of having received
16 a second deficiency letter, which I assume has gone to the
17 lawyers or --

18 MS. VAN STEENBURGH: Yes. It would have gone to
19 the lawyers.

20 THE COURT: To the lawyers, you know, perhaps for
21 those, not for the others yet, but for those we could just
22 simply try an order to show cause or something like that
23 and see if we get a response.

24 If there is no response, then perhaps dismissal
25 is in order, unless there is some other reason why there is

1 no response coming in.

2 MR. GOLDSER: My only concern is to ensure that
3 those plaintiffs and their lawyers get adequate notice of
4 the potential of dismissal.

5 THE COURT: Well, if we did an order to show
6 cause and gave them 60 days, it seems that might be a
7 reasonable period of time.

8 MR. GOLDSER: And that's fine if there is a
9 requirement of service on either the plaintiff or the
10 plaintiff's lawyer to ensure that that notice of that order
11 to show cause was given to them and that as best we can
12 under the service rules that notice is received so that
13 somebody doesn't come back later and say, hey, I didn't get
14 notice of this. I didn't know I had to respond. We don't
15 want that.

16 MS. VAN STEENBURGH: Wouldn't that be ECF, the
17 lawyer would get the notice?

18 MR. GOLDSER: I'm sorry?

19 MS. VAN STEENBURGH: ECF, the lawyer would get
20 the notice of the order to show cause.

21 MR. GOLDSER: If they're all on ECF.

22 MS. VAN STEENBURGH: Well, I think that's how
23 they had to file their case. Would you like us to prepare
24 a list of the 95 cases?

25 THE COURT: Yes, why don't you do that, and

1 perhaps if you wish, you can prepare a draft order to show
2 cause, and the plaintiffs obviously should take a look at
3 that and add their two cents' worth.

4 MR. GOLDSER: It would be useful for my purposes
5 to have not only a list of the names of the plaintiffs but
6 also their counsel and their counsel's address.

7 THE COURT: That's fine. Let's do that, and
8 let's try to focus on getting that in right away and give
9 them a 60-day period. I mean, if they have a reason for
10 why, someone may be out of the country, someone may be
11 hospitalized, and there may be very good reasons, and
12 that's certainly fine for me.

13 But if there is simply no response whatsoever
14 after that period of time, plus two earlier letters sent,
15 that seems to me to indicate a cause is being abandoned.

16 MR. GOLDSER: That's fine.

17 THE COURT: All right.

18 MR. GOLDSER: Next item on the agenda is the
19 production of the dear doctor mailing list and the identity
20 of the third-party vendor. We have been going around the
21 block on this for a while. It raised its head in the
22 Straka trial.

23 In the defendant fact sheet, there is a provision
24 that says, Did you mail the dear doctor letter and to whom.
25 And the defendant fact sheet identifies the name of the

1 doctor and the address. I will tell the Court that every
2 doctor that I can remember talking to in this litigation to
3 whom I have shown the dear doctor letter has said I've
4 never seen that before.

5 There are potentially many reasons for why the
6 doctor has never seen that before. One of those potential
7 reasons is it never got mailed to that doctor. The DFS
8 says that it's mailed. It's a statement not even under
9 oath, quite honestly, by a Johnson & Johnson
10 representative.

11 And every time we've addressed this in court,
12 Mr. Winter has indicated that, yes, we have this list, and
13 all these letters were mailed in early November. I mean,
14 he has told us this, and they were mailed by a third-party
15 vendor.

16 Well, I have now asked for the database of the
17 names of and addresses of the doctors to whom the dear
18 doctor letter was mailed. I understand from
19 Ms. Van Steenburgh that this database is now available.
20 We'll get to the cost in a second.

21 I don't know whether this is a Johnson & Johnson
22 database or a third-party vendor database. I don't know
23 who owns this database, and I don't know how this database
24 was used. I believe it was used by a third-party vendor to
25 do the mailing.

1 So I'm interested in finding out why it is these
2 doctors say they have never seen this letter before. Could
3 it be that they just don't read their dear doctor letters?
4 Of course. Could it be that they never got those letters?
5 That's entirely possible as well.

6 So I'm interested in getting the database,
7 learning the identity of the third-party vendor, taking a
8 deposition of the third-party vendor in understanding how
9 they used this database, how they sent these dear doctor
10 letters out, whether they got return addresses, you know,
11 undeliverable, that kind of thing.

12 I'm interested in doing that. We have this issue
13 extant in the Mangin case, one of the six. The doctor in
14 that case, Dr. Warren, with whom I've met pursuant to the
15 Court's order, has told me that she doesn't remember this
16 letter, and I will say, as I have said before, that there
17 are others that I have spoken to.

18 I need to find out whether Dr. Warren was on this
19 mailing list. The supplemental PFS says it was mailed
20 to -- or DFS says it was mailed to her. She says she never
21 got it. Why? I need to know. It comes again in an
22 individual case.

23 But it's a bigger issue because if there was
24 something untoward about the mailing of this dear doctor
25 letter, it opens a whole set of post black box warning

1 cases that may otherwise not have been viable for a variety
2 of reasons. I need to know that, and it's part of the due
3 diligence that I think co-lead counsel needs to undertake
4 for the post black box warning cases.

5 The database is producible at a cost of 1500 to
6 \$2,000. We have received over six million documents so far
7 and multiple databases, probably somewhere between five and
8 ten databases. So far we haven't had to pay for any of it.
9 I don't know why after, as Mr. Saul puts it, after six
10 years we suddenly have to pay for this particular database.

11 That doesn't seem to be reasonable, given what
12 has gone before, so I would like the database. I would
13 like to get the name of the vendor, and I think it should
14 be produced at no cost.

15 THE COURT: If you get the database, do you need
16 the vendor?

17 MR. GOLDSER: Yes, because I don't know whether
18 this database is in the hands of J & J. I don't know how
19 it was transmitted to the vendor. I don't know if the
20 vendor developed this database. I don't know how the
21 vendor used the database to mail out letters, what process
22 they went through to do it and how they weeded out bad
23 addresses, if they had bad addresses. So, yes, I need them
24 both.

25 THE COURT: Mr. Winter?

1 MR. WINTER: Good afternoon, Your Honor. Judge,
2 we've told them. They want us to copy the database, to
3 copy the database which has about 700,000 names, because
4 it's two mailings, one in September of 2007 and another in
5 November of 2008. We have been providing this information,
6 as someone looks, extracts it and puts it on a defendant
7 fact sheet.

8 We have been doing that. I thought we were doing
9 fine. They want to copy it. Then we just said to
10 physically copy this and send it to you is about \$1500. We
11 have been providing something --

12 THE COURT: Copy on paper or electronic?

13 MR. WINTER: Electronically. Electronically,
14 Your Honor.

15 THE COURT: Electronic copy?

16 MR. WINTER: Yeah. So that is apparently the
17 bone of contention. They want to go depose someone else
18 from a third party, they can pursue third-party discovery.
19 We have never said no to that, nor could we say no to that.

20 So this is simply about them now saying, we want
21 an extra copy of something. And all we're saying is, this
22 is the first time you've wanted something in a different
23 format or in addition to what we have previously produced.
24 We're entitled to that. It is like a simple copying cost
25 under Rule 26.

1 So we have been pretty clear to them. They want
2 it. They can have it.

3 THE COURT: Was this sent out from Johnson &
4 Johnson or through a third-party vendor?

5 MR. WINTER: The mailing is done by a third
6 party. We have the list that we have kept for historical
7 purposes, so it's in a database. It's all these thousands
8 of names of physicians with their address, which we buy the
9 list, which we have told them, from places like the AMA.

10 And we say we need this mailing to go to all
11 these types of doctors who might prescribe Levaquin. There
12 were 513,000 of them for the November 2008 dear doctor
13 letter. So we pay the AMA. They give us the list. It
14 goes in the database. The vendor sends out the letters
15 over a period of about a week because you can't mail
16 500,000 letters in one day.

17 So whatever, you know, whatever discovery they
18 want, they can get it. It won't take us more than two
19 weeks, I think, or maybe less to make the copy. We just
20 want to be paid for making the copy.

21 MR. GOLDSER: I have now gotten more information
22 in 15 seconds than I have in a long time. I only need the
23 November 2008 dear doctor letter database. I don't need
24 the September one. For the first time, I understand that
25 this list comes from the AMA.

1 I infer from what Mr. Winter said that the
2 doctors are categorized by different groups. If that's
3 accurate, I don't know what groups they are that are
4 categorized and whether all of them receive this letter or
5 whether certain categories received this letter, and we
6 still don't know who the third-party vendor is.

7 We know that it exists, but we don't know who it
8 is. I would like November 2008, and I would like the name.

9 MS. VAN STEENBURGH: Well, we'll trade off. We
10 will tag team. I was going to say, if he doesn't want the
11 289,000 on the list from 2007 and he only wants the 513
12 some, that's fine. We can do that list. We can give him
13 information as to how the list is comprised.

14 I don't know that we necessarily -- I mean, why
15 deposing somebody about that is not going to make much
16 difference. If the person is on the list, the prescribing
17 physician, and in this case, Dr. Warren was on the list,
18 was on the list for both of them.

19 The fact that she doesn't remember, how the list
20 was comprised, the fact that she was on it isn't really
21 going to make a lot of difference. I mean, it's going to
22 be shown to her, and she is going to testify about it. We
23 can certainly provide information.

24 We have been trying to be open with that and give
25 that information to them, but I think it's much ado about

1 nothing in terms of having to go out and get a lot of
2 information as to how it was comprised and when it was
3 mailed and all those kinds of things. If the person is on
4 the list, there is a presumption.

5 There is no letter with a person's name on it.
6 It's just a dear doctor letter that is blank. It's a
7 template, and the address for that doctor would be on the
8 envelope that they would have gotten in the mail.

9 THE COURT: Anything else?

10 MR. GOLDSER: No, I don't think so.

11 THE COURT: So the, just the November '08 list is
12 513 --

13 MR. WINTER: 513,000, Your Honor.

14 MS. VAN STEENBURGH: Yeah, 513,629.

15 THE COURT: 600 and what?

16 MS. VAN STEENBURGH: '29.

17 THE COURT: Okay. This is what, we need to get
18 this thing wrapped up. This has been hanging around for a
19 while. I will order the production of the November '08
20 only list, the 513,629 names. I'm not going to order
21 anything at this point relative to the third-party vendor.

22 I don't really see where that is necessary
23 information at this point. It may develop at a later time
24 that it is, but I'm not going to order that at this point,
25 but I'm also going to order that the list be provided by

1 the defense and that plaintiffs not have to pay the cost of
2 this reproduction.

3 So let's get this done. Two weeks, you say?

4 MR. WINTER: I think that's definitely doable,
5 Your Honor.

6 THE COURT: All right. And if there is other
7 issues, we can talk about them later on this.

8 MR. GOLDSER: Next item on the list begins to
9 address or addresses again the rest of the cases, the
10 nonMinnesota resident/nonMinnesota filed cases. We have
11 the 1404 cases, which Mr. Fitzgerald or Mr. Saul, if he's
12 on the phone, will address, and then we have the other
13 conditions precedent to remand order, the proposed pretrial
14 order 13 where some of the issues were briefed.

15 A number of the issues were just left silent in
16 defendants' brief, so we can talk about both of those. The
17 order to show cause on the 1404(a) cases is first, and I
18 don't know if you want to start, Ms. Van Steenburgh? Okay.

19 MS. VAN STEENBURGH: I'll be brief, Your Honor.
20 There really isn't anything more to say than what I
21 submitted as part of our briefing. At the last status
22 conference, I think the Court recalls that there was a
23 dispute in terms of the methodology for seeing if we could
24 get consent by some of the plaintiffs to having their cases
25 transferred.

1 So there is agreement between the parties as to
2 the consent, the methodologies, the issue. So we had
3 proposed an order to show cause be filed in each of the
4 cases. We've submitted our papers. There is a lot of
5 precedent in the country for doing that in 1404(a) cases.

6 We will submit to the Court a list of the cases.
7 I'm not going to go through and reiterate what's in the
8 brief. I think it's pretty clear that that's a very
9 efficient and economical method by which the Court could
10 reach out to these plaintiffs' attorneys and determine
11 whether they want to consent to transfer.

12 I know that Mr. Saul has a difference of opinion,
13 so I will sit down.

14 MR. FITZGERALD: Good afternoon, Your Honor.
15 This is Kevin Fitzgerald for plaintiff. At the last status
16 conference, we discussed the issue of 1404(a) transfer of
17 cases from the MDL. Mr. Saul had indicated if we couldn't
18 reach agreement with defendants on this issue that we would
19 need to fully brief the issue.

20 Ms. Van Steenburgh had indicated that we would
21 need to brief the issue, and Your Honor requested that we
22 tee up the motion practice as soon as possible. Last
23 Wednesday on August 22nd, the defendants filed their
24 memorandum in support of an order to show cause for cases
25 potentially subject to transfer.

1 There was no motion that was filed by the
2 defendants with that memorandum, and we actually didn't
3 realize that they hadn't filed, properly filed a motion
4 with the Court until yesterday when we had spoken with
5 Ms. Van Steenburgh, e-mailed with Ms. Van Steenburgh
6 regarding a short extension for us to file our opposition.

7 As you know, the defendants are proposing a show
8 cause order be entered in thousands of cases in the MDL
9 that are potentially subject to transfer under 1404(a). We
10 think the relief is extraordinary, and as we have
11 forecasted to the Court previously that it flips the burden
12 of proof on this issue from the defendants to plaintiffs.

13 We've, again, we think the actual mechanism that
14 defendants are arguing that the Court should employ, they
15 have the burden of proving that that mechanism is
16 appropriate, and as I explained to Ms. Van Steenburgh
17 yesterday, we will file our opposition on this issue as
18 soon as they file their motion on this issue in compliance
19 with the rules.

20 They haven't filed a motion requesting this
21 relief. We will file our opposition when they do, and it
22 may be easiest to just take this up now. We are going to
23 ask for two weeks to file our opposition once they have
24 properly filed their motion on this issue.

25 MS. VAN STEENBURGH: Your Honor, there was no

1 indication that a motion had to be filed by the defendants
2 to which the plaintiffs would respond. Mr. Fitzgerald
3 contacted me yesterday and said, oh, we haven't done our
4 briefing, we would like an extension. And I said you'll
5 have to ask the Court because the transcript indicated that
6 we were each supposed to submit briefs.

7 I did not set it up as a motion because there was
8 no indication that a motion by defendants had to be made
9 with a response by the plaintiffs. So we submitted our
10 briefing because the Court was interested in what the
11 positions were on each side, and I have the transcript, and
12 there is nothing indicating that a motion was supposed to
13 be filed by the defendants on this issue.

14 So that's the only issue that I, the issue that I
15 take issue with in what Mr. Fitzgerald has just remarked
16 on.

17 THE COURT: Well, the motion would be, if it were
18 filed, a motion for an order to show cause, right?

19 MS. VAN STEENBURGH: Yes.

20 THE COURT: Which, I mean, I think -- I would
21 like to see the plaintiffs' response. Did you say two
22 weeks, Mr. Fitzgerald, or did you need longer time than
23 that?

24 MR. FITZGERALD: We would like two weeks, Your
25 Honor.

1 THE COURT: Okay. Let's have that brief in two
2 weeks from today. Okay?

3 MR. FITZGERALD: We can do that.

4 THE COURT: All right. Very well. I'll take a
5 look at that right away.

6 MR. GOLDSER: The other part of this agenda item,
7 Your Honor, has to deal with the proposed pretrial order
8 number 13, which deals with conditions precedent to remand.
9 You have, and I know Holly asked us to send over another
10 copy yesterday, a red lined version of the proposed order.
11 The underlying order is the defendants' proposal. The
12 changes that are overlaid are plaintiffs' proposed changes.

13 You'll recall that the defense filed a brief in
14 support of their concerns about the order several weeks
15 ago, and then we had asked for time to file our response,
16 which we did. So the briefing is before you. The proposed
17 order is before you, and subject to any comments we make
18 here today, the issue is ready for you to decide.

19 As I saw defendants' brief, they were really only
20 objecting to three issues of the proposed changes that we
21 were making. One was whether you or the transferor court
22 should decide punitive damages, whether you or the
23 transferor court should decide issues of statute of
24 limitations in individual cases and whether there should be
25 a requirement of mediation in individual cases prior to

1 remand.

2 Those are the only issues that we see. On
3 punitive damages, you know, there are really two issues,
4 although I think I may have mentioned several more in the
5 brief. One is, punitive damages is a very factually
6 intensive inquiry based on the liability. You know that,
7 that record better than anybody in the country. You should
8 be the one to decide punitive damages questions.

9 To be sure, the law of the varying states will
10 vary about procedure, about substance, when punitive
11 damages can be awarded and when it can't. But you've got
12 the potentially anomalous situation of a 1404 motion for,
13 say, somebody who lives in Pennsylvania, and they want to
14 keep their case here.

15 And you decide under the venue transfer that that
16 case can stay here, but you might have another Pennsylvania
17 case that goes back to Pennsylvania under 1407. So you
18 might have a Pennsylvania decision on punitive damages here
19 because you have kept the case and a Pennsylvania decision
20 on punitive damages in Pennsylvania because it goes back
21 under 1407.

22 We think that all of the cases should be decided
23 in one place, and since there is the potential that those
24 cases will stay here and because of the factual record that
25 you know so well, you should be the one to decide those

1 cases. Otherwise we have the risk of inconsistent rulings.

2 The same is true on statute of limitations
3 issues. The potential for inconsistent rulings exists,
4 albeit somewhat less because statute of limitations
5 inquiries do tend to be a little more individual plaintiff
6 specific, when did they know, when did they know it, when
7 did they file their lawsuit, those kinds of things.

8 Nevertheless, interpretation of the law may vary
9 from one court to another, and if we're going to have
10 rulings that are consistent, then they should be done by
11 one court. Why do we want consistent rulings? A, because
12 consistency lends fairness to the proceedings, but if we
13 ever get back to a negotiating posture with the defendant
14 and we're trying to identify what cases can be resolved by
15 agreement and what can't, the statute of limitations issue
16 was one of the issues that hung us up.

17 A number of cases defense thought were
18 noncompensable because of statute of limitations issues.
19 So we should have one court deciding those so that we've
20 got some predictability for those purposes, if nothing
21 else.

22 And then finally, there is a local rule that
23 mandates a mediated settlement conference. Local Rule
24 16.5(a)(2) says within 45 days prior to trial, each case
25 not exempted by local Rule 26 shall be set for a mediated

1 settlement conference.

2 To date the settlement discussions have been
3 based on inventories. I know from my client base that
4 while most clients have agreed with our recommendation that
5 the proposed offers are insignificant and unacceptable,
6 there have been some clients who have asked me, is it
7 possible to talk about my case individually, and I have
8 said not so far.

9 And those clients would like to get their cases
10 resolved on an individual basis. The defense has said no,
11 and maybe they will still say no under a mandated mediated
12 settlement conference individually, but you never know.

13 So those are the three differences in proposed
14 pretrial order 13. We would like to get the remand program
15 going because we may run out of Minnesota
16 resident/Minnesota filed cases, and if we're ever going to
17 get to the end of this litigation, we need to start
18 addressing those cases as well.

19 MR. WINTER: There are verbiage issues, Your
20 Honor, differences, which probably could be resolved, but
21 let me focus on the three items Mr. Goldser raised. Judge,
22 you've ruled on motions to amend complaints to add claims
23 for punitive damages because of Minnesota procedural
24 requirements, and the way their remand order is, it's your
25 ruling on motions to amend.

1 If you were to look at about 1500 of the
2 complaints in this MDL, they already include claims for
3 punitive damages because most states allow you to put in a
4 claim for punitive damages in your complaint. So this is
5 like a complete apples and orange discussions as to what
6 you've ruled on.

7 You've got some procedural barriers or
8 differences that exist when you've ruled on every motion to
9 amend a punitive damage here, whereas I can show you a
10 complaint from a case in New York, a case in California,
11 pick a state, and you don't decide the punitive damage goes
12 to the jury until the close of the plaintiff's case.
13 That's the way it works if there hasn't been, you know,
14 bifurcation.

15 You know, Judge, and we pointed it out to you,
16 that those types of determinations, like a directed verdict
17 motion, you cannot make unless it is a Minnesota case or a
18 case where you have made a ruling that you're going to keep
19 it because that's not a pretrial determination as we
20 pointed out to you.

21 And I think if you looked at each case that the
22 plaintiffs cited for an MDL court ruling on punitive
23 damages across the board, there are aviation cases. There
24 is an *Amtrak* case. There are maritime injury cases where
25 there is federal preemption possibilities, so it may make

1 sense for a judge in a federal court with an MDL to make a
2 ruling on the application of federal law that would apply
3 to all the cases, but that's not what we have here at all.

4 Statute of limitations, you haven't made one
5 ruling yet, I believe, on a summary judgment motion for
6 statute of limitations purposes. They're extremely fact
7 intensive. We all know that. We would have to go through
8 all sorts of medical records to see, was, did the doctor
9 write down, described risk of tendon rupture to the
10 plaintiff in 2005, which may exist. So a case filed years
11 later, we have discovery issues. Those are, again, issues
12 which you should not rule on in 1500 cases.

13 If you end up keeping a case because you deny a
14 forum non conveniens because a plaintiff didn't want to
15 have their case remanded, then you're going to issue your
16 rulings. That's pretty straightforward.

17 As to this mediation, it's actually prior to
18 trial. That's the local rule here. So if we have a case
19 going forward prior to trial, we could be required to
20 mediate that case. Your Honor is well aware, the parties
21 have tried to discuss this. It's not working for these
22 plaintiffs.

23 It may work for other plaintiffs, but mandating
24 that mediation across the board, Judge, is just not right
25 or fair or worthwhile or a productive use of the Court's

1 resources. There is one other suggestion they made for
2 arbitration, like ordering arbitration. We would never
3 consent to that, so that issue is non sequitur.

4 I think, Judge, we have set out in the prior
5 briefing, there are limits to what your authority is, and
6 it's to pretrial matters. These last few issues are not
7 pretrial matters. All those other complaints, they have a
8 cause of action in there. The transferor court I think has
9 to decide that.

10 Thank you, Judge.

11 MR. GOLDSER: I appreciate the fact that most of
12 the complaints have punitive damages in them. I'm
13 reluctant to acknowledge that all those cases where
14 punitive damages could be sought already have the pleading
15 in them.

16 Really what I'm seeking out of this proposed
17 pretrial order is a provision that the Court enters that
18 says before a case is remanded, if plaintiff wishes to
19 amend the complaint to allege punitive damages, that must
20 be taken up by this Court, and this Court will rule on it.

21 Similarly, if defendant wishes to bring a motion
22 for summary judgment based on statute of limitations issues
23 before the case is remanded, the defendant must bring that
24 motion before this Court, and this Court will deal with it.
25 As the manual talks about the MDL on pretrial issues is

1 supposed to deal with all those things, and cases are
2 supposed to go back to the trial court trial ready.

3 As to mediation being limited to only immediately
4 prior to trial, our recollection is that Judge Davis had a
5 provision in the *Baycol* litigation, although I haven't
6 chased this down yet, but it's our recollection that he
7 required mediation prior to remand in *Baycol* so that that
8 provision under the local rules has been used before in
9 other MDL litigation.

10 I could verify that if the Court would like, but
11 that's our best recollection on that subject.

12 MR. WINTER: If a case cannot be remanded until
13 we decide whether or not we want to move for summary
14 judgment on statute of limitations purposes, which is what
15 Mr. Goldser just said, we will have to do complete
16 discovery in 1500 or 1600 cases, Judge, because we can't
17 make that determination until we've done a sufficient
18 factual inquiry.

19 Same rule is going to apply on whether or not
20 punitive damages survive a directed verdict. If it's in
21 the complaint, it's in the complaint. If some person who
22 has filed a complaint here says after his case is remanded
23 or her case is remanded, I forgot to move for punitive
24 damages, one of those rare cases, then they file the motion
25 when the case gets transferred, and either it sinks or it

1 swims on that.

2 This is, there is no MDL decision which says, as
3 Mr. Goldser wants you to, that any directed verdict motion
4 on punitive damages has to be decided by the MDL judge, and
5 you can't -- you have to make a summary judgment motion on
6 statute of limitations before a case is remanded or it's
7 waived.

8 That is what he wants you to do, and that's
9 clearly not what the MDL rules allow.

10 THE COURT: Okay. Anything else?

11 MR. GOLDSER: No, Your Honor.

12 THE COURT: Okay. I'll take this matter up right
13 away.

14 MR. GOLDSER: I would like to skip over the PTO 3
15 item for a second. We have future trial dates and an add
16 on item, the read in issue that I would like to address.
17 Let me take up the read in issue, and maybe with the moving
18 of the trial date, this doesn't have quite as much heat
19 under it as it did earlier with an October 29 trial date.

20 But I certainly would like to get an
21 understanding from the Court about what prior testimony we
22 may use by read in, and this really applies more than
23 anything else to various expert witnesses. As you know in
24 the last trial, we read Cheryl Blume's testimony because
25 she wasn't available. That seemed to work pretty well. I

1 don't think there was any problem in terms of procedure or
2 even jury interest on that one.

3 We have a number of cases that are going to need
4 to be tried. I am very concerned about the cost of those
5 trials. That's why we want to consolidate them. I'm very
6 concerned about the cost of those trials even if they're
7 consolidated by having to call the same experts over and
8 over.

9 And that's both from a cost perspective, as well
10 as ultimately, you know, with the same experts being called
11 over and over again, they're going to some day say to us,
12 you know, I've got a professional practice that I've got to
13 keep up. I can't keep coming to court.

14 We had proposed last trial that we be able to
15 videotape those experts' testimony so that we would have
16 videotape live in the courtroom. You declined to let us do
17 it last time. Perhaps we should do it the next time, but
18 we would like to take up this issue of how to most
19 economically and efficiently use expert testimony, at least
20 plaintiffs' case in chief, going forward.

21 Reading in prior trial testimony is one way of
22 doing it. Recording them at trial is another way of doing
23 it. I suppose taking a broad based, reusable deposition de
24 bene esse -- I'll spell that for you -- is another way of
25 doing it, albeit we've used the experts multiple times

1 already, and I'm reluctant to make them have to appear over
2 and over again even one more time.

3 That's an issue that is out there. With the
4 trial date being postponed, I don't know if this is an
5 immediate issue, but it certainly is something that we need
6 to get some clarification on sooner rather than later.

7 Does the Court have a preferred way of dealing
8 with this, of addressing it prior to the night before
9 they're supposed to show up?

10 THE COURT: Well, I think I would probably rather
11 deal with it at a point somewhat closer to trial, but do
12 you have a view, Mr. Winter or Ms. Van Steenburgh?

13 MR. WINTER: I think, Your Honor, we need to
14 defer this for a little bit of time to come up with a
15 better idea of a concrete proposal from the other side to
16 which we can respond to, and we will address it obviously
17 expeditiously.

18 I think Mr. Goldser is right. The day before
19 someone testifies probably is not the right time, but I do
20 not think the next 30 or 60 days is probably appropriate.

21 MR. GOLDSER: That's fine. We will make them a
22 specific proposal. They can respond, and that will help
23 frame the issue for the Court.

24 THE COURT: All right. We should take this up
25 probably by December.

1 MR. GOLDSER: Okay. We will do that. The other
2 question on trial dates was future trial dates. We have a
3 March date. I had earlier today suggested we schedule
4 other trial dates while we're at it. I don't know if the
5 Court has any desire to do that. We would like to get some
6 dates.

7 THE COURT: I don't think so today, but once we
8 decide which cases, case or cases, would be tried starting
9 in March, I think we can set another date at that point in
10 time.

11 MR. GOLDSER: Okay. And finally the last item on
12 today's agenda that I'm aware of is the amended pretrial
13 order number 3. This primarily focuses on the New Jersey
14 settlement. I know there are other settlement discussions
15 that are going on out there. So it's broader than just the
16 New Jersey settlement, but it's specific to the New Jersey
17 settlement.

18 You'll recall that at the last hearing,
19 Mr. Winter said he was reluctant to but may be forced to
20 file an interpleader motion to deposit the money with the
21 Court if this couldn't be resolved, and he indicated he
22 would not pay over the money to New Jersey until it was
23 resolved.

24 As the Court has seen, we have since gotten a
25 letter from defense counsel in which they say they will pay

1 over the money, that MDL counsel should address this with
2 New Jersey counsel, Mr. London and his colleagues. That
3 letter on August 22nd specifically says, A settlement
4 agreement has been signed regarding cases filed by the New
5 Jersey counsel.

6 Last night, Mr. London and Mr. Meadow filed a
7 response in a variety of fashions. One of the things they
8 say is that first as of today, which was yesterday, there
9 is no executed master settlement agreement between
10 defendants and the subject law firm.

11 I don't know whether there is a signed agreement
12 or there isn't a signed agreement, but what I do know is
13 the defendant is now planning on sending the money directly
14 to New Jersey counsel.

15 Mr. London indicates in his responsive letter
16 filed last night that pursuant to our discussions, he
17 agrees that the money should be held up pending resolution
18 of this issue, and he is requesting a briefing schedule.
19 We have no problem with a briefing schedule, as he
20 requests.

21 We certainly agree that the money should be held
22 up. The only money that we think should be held up is the
23 amount in controversy, which we suggest is 12 percent of
24 the total settlement. We certainly don't want to hold up
25 the clients' receipt of the money. I want to make that

1 clear. We only want to hold up the amount that is in
2 controversy.

3 Mr. London suggests he should be the one to hold
4 the money. I think that contravenes existing pretrial
5 order number 3 in which the order says that money shall be
6 deposited into an account that the Court has the authority
7 to control.

8 Mr. London believes, I'm not sure if he said this
9 in his letter, but I know believes that the Court does not
10 have jurisdiction and authority over him. So we would like
11 to see that money go somewhere that ensures that it remains
12 in place and intact until the Court addresses the
13 assessment issue.

14 I guess there are three places, four places. One
15 would be for defendant to hold it; second, for it to be in
16 an account in Minnesota either under the Court's direct
17 control or under MDL counsels' control subject to court
18 order; or in Mr. London's control. And that's the one that
19 I have concerns about the Court's jurisdiction over
20 Mr. London.

21 So we're not that far apart on the small issue of
22 what to do right now. The money should be held up, and
23 there should be a briefing schedule. It's just a question
24 of where to put it until the issue is decided.

25 THE COURT: Mr. Winter?

1 MR. WINTER: I hope this doesn't become another
2 Mr. Winter motion, Judge. Last time we were here, Judge,
3 I'm looking at the transcript. I said we had reached a
4 definitive agreement and it looked like in 60 to 90 days
5 money would move. I then said this motion has been pending
6 since the spring, and it probably needed to be brought to a
7 head.

8 We said we would comply with your orders, and we
9 didn't want to bring an interpleader action. There is a
10 definitive agreement. Just so the record is clear, there
11 is a requirement for a number of individual releases to be
12 provided before the money moves. So that's a process
13 ongoing with those plaintiffs, and that's why we're
14 thinking that 60- to 90-day period.

15 Your order, your current order for pretrial order
16 number 3 says, if for any reason -- I'm reading from A1c --
17 if for any reason the assessment is not or has not been
18 withheld, so clearly that's contemplated here, the
19 plaintiff and his counsel are jointly responsible for
20 paying the assessment into the common benefit fund
21 promptly.

22 Now, I saw Mr. London's letter to you last night,
23 which everyone got, and he is clearly stating that he is
24 going to comply with that, and how -- and he even said how
25 long he will hold it after the money moves. It seems to me

1 that this issue between these plaintiffs has to be resolved
2 in front of you, should be done expeditiously. Mr. London
3 has said he's going to follow your, you know, follow these
4 rules.

5 Again, we don't want to be involved in this.
6 This is their issue, and we just want them to take care of
7 it.

8 THE COURT: Well, the request was a briefing
9 deadline of September 27th, I believe, in the letter, is
10 that correct?

11 MR. GOLDSER: I believe that's right.

12 THE COURT: And that would be for everybody to
13 file briefs who is interested?

14 MR. GOLDSER: That would be for everybody who
15 opposes the proposed order to file briefs, Mr. London and
16 his colleagues as well as anybody.

17 THE COURT: And would you need time to respond?

18 MR. GOLDSER: Probably. Yes.

19 THE COURT: And as I read the letter, there is no
20 proposal to do anything with the money until this is
21 resolved, is that correct?

22 MR. GOLDSER: Mr. London's letter is a little bit
23 ambiguous on that point. He says 75 days or until the
24 matter is resolved, and it's not clear whether if 75 days
25 comes and goes that, without an order, that he would then

1 be free to move the money.

2 THE COURT: So is something necessary to keep
3 that from happening until this gets resolved? I think
4 they're suggesting that we don't need to do anything.

5 MR. GOLDSER: I anticipate, because Mr. London
6 and I have had this conversation before, that there will be
7 a question of the extent and scope of the Court's
8 jurisdiction over this settlement and various lawyers who
9 are participating in this settlement.

10 As our letter made clear, not only is it those
11 three firms, but there are a number of other lawyers from
12 other firms who have referred their cases into those three
13 firms, some of whom are MDL counsel, some of who have cases
14 clearly filed in the MDL.

15 So the scope of the Court's jurisdiction over
16 these funds is going to be an issue, and the scope of the
17 Court's jurisdiction over the lawyers who are controlling
18 these funds is going to be an issue.

19 And while I'm sure that Mr. London would not
20 knowingly and willingly violate an existing Court order, he
21 might have an argument to say the Court has no jurisdiction
22 over him or perhaps the lawyers from Parker Waichman who
23 did not have cases filed in the MDL themselves would say
24 the Court has no jurisdiction over us, so please give us
25 the money.

1 And so if, if that position is taken and the
2 money is under their control, they're at some liberty,
3 albeit at some risk, to distribute that money. And they
4 could say, you know, even though the order says plaintiffs'
5 lawyers are personally responsible as PTO 3 now exists, if
6 there is no jurisdiction over them, then there is no
7 jurisdiction over them.

8 I don't want even to get into that argument until
9 the Court decides what its jurisdiction is, and I would
10 like to have that money in a place where it is not at any
11 risk and in hold so that once the Court decides what should
12 be done with it, it can be done rather than having to chase
13 this lawyer or that lawyer or having to claw back money.

14 We've all seen claw backs in this court and this
15 state in recent times and under certain circumstances, and
16 I don't want to have to do that. I think we should decide.
17 I think the money should be held in one place, and then it
18 should be disbursed.

19 MR. FITZGERALD: Your Honor, this is Kevin
20 Fitzgerald. If I could be heard briefly on this?

21 THE COURT: Sure.

22 MR. FITZGERALD: It seems at least from our
23 perspective, you know, we're talking about an MDL
24 assessment that the defendants are required by your order
25 in the MDL, as entered in the MDL, to withhold the funds if

1 money is to change hands.

2 It seems to us that it would make the most sense,
3 because this is an MDL order entered by Your Honor, that
4 the funds be held in an account in Minnesota, that
5 plaintiffs co-lead counsel have established and which Your
6 Honor will have jurisdiction over until these issues are
7 fully briefed and resolved.

8 I have nothing further.

9 MR. GOLDSER: And one other argument, Your Honor.
10 I would like to make clear for the record that we
11 personally sent to Mr. London, Mr. Meadow of the Lanier
12 firm and Matt McCauley of the Parker Waichman firm
13 yesterday the Court's call-in number, the time of this
14 settlement conference and a copy of today's agenda.

15 I know that Mr. London and Mr. Meadow are on ECF.
16 They will have seen this motion filed on ECF, and I believe
17 some of this material is communicated to Parker Waichman
18 via either us or Mr. London, although I'm not sure the
19 entire scope of what he was sent, but they were aware of
20 this and the opportunity to call in today and be heard.

21 THE COURT: Mr. Winter?

22 MR. WINTER: Just to Mr. Fitzgerald's point.
23 Judge, the only reason we're here is that a motion was made
24 to amend pretrial order number 3 six months ago or five
25 months ago or four months ago, and if it had not been

1 amended, then there would have been the 3 percent
2 assessment and life would have gone on.

3 But your order specifically says that there can
4 be instances when we did not withhold, and that's because
5 you have people on the plaintiffs' side in a dispute, and
6 in that instance, your order expressly says that the
7 plaintiff's lawyer becomes responsible for that.

8 So, you know, we, again, we don't want to get
9 involved with this. We didn't create it. We just think
10 you need to decide it.

11 MR. ZIMMERMAN: May I say something?

12 THE COURT: Sure, Mr. Zimmerman.

13 MR. ZIMMERMAN: Just as a matter of -- Charles
14 Zimmerman. As a matter of background, I have been talking
15 to Mr. London and to Mr. Lewis Saul and to Kevin and to Ron
16 about this issue for some time. This isn't a new issue.
17 We tried to reach agreement on how this should happen. We
18 couldn't. I think we just have to -- we got close, but we
19 couldn't.

20 It's not to say we may not in the future, but we
21 didn't. The problem is that settlement occurred in New
22 Jersey. People want to move the money. Obviously we don't
23 want to in any way prevent the money from moving to the
24 people who deserve it, but we've got to be careful about
25 this assessment because the exact number hasn't been set,

1 and we can't lose control of it until the Court decides
2 what is the right thing to do.

3 Mike London and his folks want to be heard on
4 what the right number is and what the right way to handle
5 it is. If we can't agree, they should be heard, but we
6 just don't want to do any jeopardy in between. I thought
7 we had an agreement with defense counsel that there was not
8 going to be any movement of money until this was resolved,
9 but perhaps that's changed because time has elapsed, and
10 that's perfectly appropriate.

11 I think at the last hearing, you said there
12 wasn't going to be any movement of money for a while. So
13 now we're at a critical point. So I think the Court has to
14 just decide what's the best thing to do under the
15 circumstances. Nobody wants to have this fight, but if we
16 have to have it, let's have it with all hands on the table.

17 Let's have it fairly in front of Your Honor so
18 you can make the right decision and nothing has left the
19 building without anybody knowing about it. That's my
20 position.

21 THE COURT: Nothing is in the hands of the
22 plaintiffs' counsel in New Jersey yet, correct?

23 MR. WINTER: That's correct, Your Honor.

24 THE COURT: And what is your estimate of when
25 that would be available?

1 MR. WINTER: As I said the last time, Judge, it
2 looks like 60 to 90 days. They have to come up with a
3 significant number of releases before we send the check.

4 THE COURT: All right. Well, I mean, clearly
5 they have a right to be heard on this, and I'm inclined to
6 give them until September 27th to get responses in and then
7 decide it after that, perhaps giving a little time for a
8 reply.

9 They don't have money in their hand right now.
10 It's hard to order them not to do anything when they don't
11 have money sitting there right now. Perhaps the best way
12 to proceed here is to require the defense to give some kind
13 of notice to the Court if the money is ready to be
14 transferred so that we can make sure that this matter is
15 resolved before that date.

16 MR. WINTER: Very good, Your Honor. We will
17 definitely do that.

18 THE COURT: Let's do it that way. Okay?

19 MR. ZIMMERMAN: Thank you, Your Honor.

20 THE COURT: Okay. We'll issue a short order just
21 requiring briefing by September 27th on this issue.

22 MR. GOLDSER: And with replies from those who
23 need to?

24 THE COURT: Any replies a week later.

25 MR. GOLDSER: That would be fine.

1 THE COURT: All right.

2 MR. GOLDSER: That would be fine. I think that
3 concludes the agenda as I understand it.

4 THE COURT: Did you have anything else,
5 Mr. Winter or Ms. Van Steenburgh?

6 MS. VAN STEENBURGH: No, Your Honor.

7 MR. WINTER: No, Your Honor.

8 THE COURT: Okay. Very well. Why don't we set
9 another date for a status conference? I'm sure we will
10 have something to talk about. Some time toward the end of
11 September, perhaps?

12 MS. VAN STEENBURGH: Mr. Winter and I talked
13 about it before we came today, and we thought around the
14 10th of October because we will have a lot accomplished
15 hopefully by then.

16 THE COURT: That's fine. Probably the week
17 before would be better, if that's, if that's okay.

18 MS. VAN STEENBURGH: That's fine.

19 THE COURT: I was looking at Wednesday the 3rd.
20 Is that okay?

21 MS. VAN STEENBURGH: That doesn't work for us.

22 THE COURT: Tuesday the 2nd?

23 MR. GOLDSER: Same problem. I have a trip to
24 Chicago, a business trip that I need to attend on Tuesday
25 and Wednesday of that week. Monday would be fine, and

1 Thursday would be fine.

2 MR. WINTER: Does Friday work?

3 THE COURT: I'm going to be, I have to be in
4 Moorhead on Thursday and Friday of that week.

5 MR. WINTER: Monday would work for us, Judge.

6 THE COURT: Monday afternoon, the 1st?

7 MS. VAN STEENBURGH: Sure.

8 MR. GOLDSER: Sure.

9 THE COURT: Two o'clock. Okay. Let's set it for
10 that date.

11 All right. Anything else for today? Anything
12 from anyone on the telephone?

13 MR. FITZGERALD: No, Your Honor.

14 THE COURT: All right. Very well. Thank you.

15 MR. IRWIN: Thank you, Judge.

16 THE COURT: Thank you. We will be in recess, and
17 we will take up the matters that are currently pending.

18 THE CLERK: All rise.

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1 I, Kristine Mousseau, certify that the foregoing
2 is a correct transcript from the record of proceedings in
3 the above-entitled matter.

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7 Certified by: s/ Kristine Mousseau, CRR-RPR
8 Kristine Mousseau, CRR-RPR

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